

Canadian Bar Association Report and Recommendations on “Racial Equality in the Legal Profession”

Introduction:

1. In February, 1999, the Canadian Bar Association (CBA) released its report with recommendations on **“Racial Equality in the Canadian Legal Profession”**. Initiated in 1995 as a direct response to recommendation 13.3 of the CBA’s report on Gender Equality (**Touchstones for Change: Equality, Diversity and Accountability**), this report addresses issues faced by “racialized communities”, i.e., Aboriginal peoples and people of colour, in their efforts to participate in the legal profession in Canada and to receive justice in the Canadian legal system. A detailing of challenges, barriers and opportunities for change, the report provides a unique look into the issues of racial discrimination in terms of entry to and activity within the practice of law, and various models promoting racial equality within the legal profession. It also makes recommendations on how the CBA can take effective action in a planned, coordinated and cohesive manner to promote racial equality in the legal profession.

2. Essentially, the report is broken into three parts:

- a) the report of the CBA Working Group on Racial Equality in the Legal Profession co-chaired by Benjamin Trevino, Q.C. and Professor Joanne St. Lewis;
- b) a report by Professor St. Lewis entitled **“Virtual Justice: Systemic Racism and the Canadian Legal Profession**; and
- c) a bibliography of critical race theory articles.

The first two reports are part of the CBA’s **“Racial Equality in the Canadian Legal Profession”**; the bibliography is available as a separate document.

3. Together, the two reports and bibliography provide an opportunity for the Law Society of Upper Canada (LSUC) to reaffirm its commitment to equity and diversity as adopted in the **Bicentennial**

Report on Equity Issues in the Legal Profession and to encourage the CBA to adopt its report and to move ahead on its implementation.

Racial Equality in the Canadian Legal Profession:

4. The CBA report is divided into two parts which address the same issues. These are:

- S the history of racial discrimination in the Canadian legal profession;
- S law school as the first step to entry into the profession;
- S articling requirements and bar admission courses;
- S employment barriers and discrimination within the practice of law;
- S equity in judicial appointments and access to justice;
- S the unique relationship of Aboriginal peoples; and
- S actions incumbent on the CBA to promote racial equality in the legal profession.

5. The CBA Working Group report has stated its intention of being brief and moving through limited content on each section in order to proceed to its recommendations. Professor St. Lewis' report provides a more critical approach, underlining and calling on the presentations made to the Working Group and providing her own point of view in support of concerns received during the consultations.

The following provides a brief synopsis of each report.

The Working Group Report:

6. This report begins with the statement: "Canadian laws define discrimination and make it illegal, but we, as a society, have not been successful at obeying these laws and eliminating discrimination. Clearly, the challenge is for the individual members of our society and for institutions and organizations in which we work to put the legal principles into practice" (p.1). It then defines 'systemic discrimination and individual acts of racism' to introduce the scope of its concerns in terms of institutional policies and programs as well as individual behaviour. In this context, it refers to adverse impact, discriminatory outcomes that are unintended and individual acts of prejudice,

harassment and discrimination.

7. The report also points out: “When individual accounts of racist acts and racial prejudice cannot be told publicly because the risks to the individuals are too great, we begin to appreciate the depth and impact of discrimination in our profession” (p.2). The report then notes its concerns in the categories identified above.

- < **History of racism in the legal profession.** Concerns about the past are summarised in highlighting discrimination faced by: Delos Davis and Bora Laskin who faced difficulties in getting articling positions; Chinese, Japanese, South Asian and Aboriginal peoples in British Columbia who were prohibited from becoming members of the Law Society until the late 1940s; and the provisions of the Indian Act which, until 1951, forced Aboriginal peoples to choose between their Indian status and pursuing a legal education.

- < **Law School as entry to the profession.** The process of considering and entering law school is identified along with barriers faced by racialized students, including: racist jokes and stereotyping in student newspapers; racist comments by students; the small number of racialized students in law schools and role models or teachers who understand the experience of racism; the financial hardship imposed by attending law school; and the absence of faculty from racialized communities. Addressing these barriers, several positive models were identified, including: summer programs to support high school students interested in law; outreach programs inviting racialized students who write the LSAT to apply to law school; admissions’ policies that look beyond LSATs and grade point averages; changes to course curricula to eliminate racist or sexist materials and so on.

- < **Articling and Bar Admission Courses.** The requirement to article is critical in being called to the bar. The report notes: “It is readily apparent that any discrimination that exists in the way students get articling positions, in the work they are given during articles, in the evaluation of their articles and in how Bar Admission Courses are structured can have a

serious impact on students from racialized communities” (p. 11). Several examples of barriers are identified, including: bias in interviewing and hiring for articles; negative perceptions by articling principles about the quality of students from racialized communities leading to either refusal to hire or restricting the work of such students; students forced to work for free or for minimum wage; and fears by racialized students to complain about discrimination in the articling experience. (The report points out that in 1996 the LSUC found that of 133 students still looking for articles, 43.9% were from racialized communities even though these students comprised only 17% of the graduating class.)

In terms of the Bar Admission Courses, several barriers are identified, including: exam-based evaluations failing to consider different learning styles or different ways of demonstrating knowledge and ability; in testing for the practical application of law, students with poor articling experiences are at a disadvantage; little to no reflection of racialized communities in course materials; and inappropriate assessment of foreign-trained lawyers seeking to practice in Canada. Several models are identified addressing some of these concerns, including: providing ‘career days’ for firms to attract articling students; law societies and schools finding articling assignments for those who do not have one; and establishing equitable hiring practices.

< **Employment barriers.** The Working Group starts this section of its report in stating: “The brick wall blocking people from racialized communities from senior positions in law firms, corporations and government became shockingly apparent to the Working Group” (p.17). It further notes: “...to the extent to which the decision to leave law is linked to systemic discrimination which continues to exist in the profession, the issue needs to be addressed” (p.17). Examples of barriers faced by lawyers from racialized communities are provided to underscore the aforementioned points, including: the barriers to attaining articles influences one’s ability to attain employment. (The Nova Scotia Barristers’ Society noted in 1995 that 70% of white males were hired back after their articles, only 28.9% of white women were hired back and no students from racialized communities were hired back); the apparent lack of advertising for employment by law firms leaving recruitment largely to word-of-mouth and

networking; the influence of bias and stereotyping in terms of the type of work lawyers from racialized communities wish to undertake and the belief that such lawyers will not interact well with clients. Several models are identified addressing these concerns, including: employment equity practices; harassment and accommodation policies; advertisements for employment and internal reviews of recruitment policies to ensure they do not pose barriers to racialized communities.

- < **The judiciary and access to justice.** This section of the report discusses the influence of the judiciary, particularly judges, on how law is interpreted and applied. The importance of both having judges from racialized communities as well as ones who understand the impact of racism on society are reviewed. The procedures for appointment of judges are identified and barriers faced by racialized communities also discussed, including: lack of information on the percentage of judges from racialized communities; a number of inquiry and commission reports (eg., “Royal Commission on the Donald Marshall, Jr., Prosecution”, 1989, and “The Final Report of the Commission on Systemic Racism in the Ontario Criminal Justice System”, 1995) documenting problems with racism in the justice system, including decisions about keeping an accused in custody, courtroom dynamics and sentencing decisions.

- < **Aboriginal peoples.** A separate section on Aboriginal peoples is provided to highlight the need for specific action to address the concerns of this community. While many of the issues faced by Aboriginal peoples are similar to those of other racialized groups, there are a number of issues that are particular to Aboriginal peoples that need to be viewed separately, including: the law school curriculum and Bar Admission Courses tend to perpetuate an adversarial approach and do not recognize this as a barrier to students with different values’ system; the lack of progress made since the 1988 CBA report “Aboriginal Rights in Canada: An Agenda for Action” which, in regards to the legal profession, called for increased education of lawyers and the public on Aboriginal issues and increased participation by Aboriginal peoples in the justice system. A few models have been identified addressing some of these issues, including: providing courses and seminars on Aboriginal law issues in law school and Bar Admission Courses; providing credits for law courses completed by

Aboriginal students in pre-law programmes; and having law societies track the success of Aboriginal graduates.

- < **Access to the courts.** In this section, the Report focusses on the importance of legal aid and court interpreters to promote and ensure access to the courts for low-income racialized groups. The Report notes the “... deterioration in legal aid funding across the country (as having) a disproportionate impact on many people from racialized communities as they represent a disproportionate number of people living below the poverty line” (p.31). Particular reference is made to immigration and refugee claimants who are also predominantly from racialized communities. Issues relating to access to counsel and court interpreters are identified as barriers these communities face. Models for action were presented to the Working Group by legal clinics specializing in service delivery to racialized communities.

- < **The CBA’s responsibilities.** This section of the Report discusses the importance of the CBA taking a leadership role in addressing the concerns documented by the Working Group. The Report points out several barriers imposed by the CBA impacting on racialized lawyers, including membership fees and the structures for participation. The Report notes the model of the American Bar Association which has a Commission on Minorities managed by a director with several staff members.

Professor St. Lewis Report:

8. Entitled “**Virtual Justice: Systemic Racism and the Canadian Legal Profession**” Professor St. Lewis’ report concurs with many of the issues raised by the Working Group. There are, however, significant differences in her approach. This is evident in her style and in her openness regarding the challenging issues brought forth in the consultations which she believes essential to raise.

9. Examples of stylistic differences and their substantive implications are immediately evident

beginning with concerns about the title of the Working Group report: “One of the prominent criticisms to be levelled at the Working Group concerned our titular mandate of ‘Racial Equality’. Racial equality as a term can itself mask the pernicious impact of *racism*. The Canadian Bar Association intended to temper the emotional impact and apparent negative response which is attached to the term racism by searching for more neutral terminology. In that sense, the title was intended to increase the comfort of those who would participate in our work” (p.59).

10. Shortly after this, she writes: “We conclude that the legal profession is effectively segregated. It is segregated because the absence of certain communities is not strictly the result of individual choice, inclination or community self-selection. Entire sectors of the profession, such as the vast majority of large firms, licensing bodies, associations and law school academy lack proportional representation from racialized communities or anything close to it” (p.60).

11. Professor Lewis then retraces the subject areas examined by the Working Group. The following summarises the substantive differences revealed in her work:

< **Law Schools.** This section of the report provides a more in-depth analysis of the areas which pose barriers and need attention. In particular, concerns regarding lack of data linking the applicant pool with the successful candidate pool is noted. “This makes the task of unmasking systemic patterns of exclusion even more difficult. This means subtle or direct discrimination in the admissions process can be hidden within current procedures. There is no public accountability for admissions results” (p.60). In terms of admissions criteria for law schools, Professor St. Lewis also notes: “There is strong resistance within the legal community to what are seen as ‘special measures’. There is a presumption that the difference in criteria is actually a lowering of ‘objective’ standards” (p.60).

< **First Nations/Aboriginal Peoples.** This section focusses on the constitutional and historical location of Aboriginal peoples in Canada as being unique and a critical part of Canada’s ‘tri-juridical nature’. It points out the particular constitutional relationship between the federal government and Aboriginal peoples which distinguishes their situation from that of other

racialized groups. It further identifies the distrust Aboriginal peoples have for the justice system and Canadian law as being incapable of treating them fairly particularly since “(t)he legal system has played an active role in the destruction, denial or limitation of First Nations cultural practices. The operations of the criminal justice system, whether intentional or not, have resulted in significant over-incarceration rates of First Nations peoples. This is coupled with their almost total invisibility at the most senior levels of policy-making and decision-making in the administration of justice. First Nations peoples also labour under a historical and contemporary myth that their legal and educational systems are less sophisticated than the Canadian systems” (p.69).

< **The Practice of Law.** Addressing barriers to employment and education for admission to the bar, this section highlights the importance of demonstrative action to eradicate employment barriers facing peoples from racialized groups. “History shows that in the face of blatant racism, legislative action had to be taken to permit entry into the practice of law by individual lawyers from racialized communities” (p.73). In terms of bar admission courses, the concerns of students are underscored and the impact of the educational and articling environment highlighted. In terms of responsibilities for law societies, Professor St. Lewis focusses attention on the importance of having anti-discrimination rules in codes of professional conduct. However, she also notes the relatively few complaints made under these rules and points out that most rules: do not define discrimination; fail to establish a duty as opposed to a ‘responsibility’ to respect human rights values; have no adequate enforcement mechanism; rely on lawyer self-monitoring; fail to address lawyers as employers; and provide piecemeal adaptation of human rights code or Charter language.

< **The Justice System.** This section raises issues regarding the application of equality analysis in decision-making and vigorous application of the Charter of Rights and Freedoms in legal arguments and jurisprudence. The absence of data to support allegations of systemic inequalities and the lack of Canadian-based critical race theory are noted. Further, the need for judges to understand the social context of litigants is underlined and the importance of using the Charter as something more than discretionary in the formulation of legal opinion and

court decisions. In addition, Professor St. Lewis acknowledges that “(t)he judiciary has demonstrated the strongest commitment to education on social context of any sector of the legal profession. Social context education focusses on how neutral application of legal concepts can produce inequality. The National Judicial Institute’s social context program includes staffing and an advisory committee which includes racialized judges and academics to assist in the development of its curriculum” (p.84).

< **Professional Associations and Defining Justice into the Millennium.** The development of legal associations amongst racialized lawyers is identified as a challenge to the relevance of the CBA to these individuals and groups. A number of issues have been raised by racialized lawyers regarding barriers to participation in the CBA, including: policy issues of concern are not addressed as well as under-representation in decision-making and a sense of discomfort with the CBA. In terms of the future, Professor St. Lewis writes: “Systemic racism, like other forms of systemic discrimination, is the most pernicious problem facing racialized communities. Individuals in institutions often make decisions without ever considering the underlying values and consequences of actions which are seen as ‘every day common sense’
...

“The legal decision-makers and individuals who participated in our consultations were united in their commitment to ensure that racism is eliminated from their organization. Their efforts were hampered by the lack of coordinated effort across the sectors in the legal profession to target the fundamental structures which reinforce racist practice. They were also limited by a lack of adequate financial resources.”

Professor St. Lewis then concludes: “As lawyers we must become radical. Radical in the sense of going back to our roots. The root of the law is justice. It demands that we no longer tolerate or remain passive in the face of racism” (p.91).

Analysis of the Report:

12. The two reports are cogent commentaries on the issues of racial equality and racism within the Canadian legal system. As integral parts of each other, they blend well; where one report focusses on the challenges to promote equality, the other provides an indictment of the legal system and puts forward the challenge that any attempt to promote racial equality must be done within the context of both understanding the depth of racism within Canadian society and the legal system and, thereby, taking action to eliminate it.

13. Unfortunately, both reports are not presented in this way and the CBA will need to reconcile these documents at its annual meeting in Edmonton in August. In terms of the Law Society, there are a number of issues that should be considered in presenting its response to the CBA. These relate to:

A) Critical race theory analysis and scholarly approach. Defined as “...suggest(ing) a complex strategy to use to eliminate racial discrimination in law and in society” (p.vi), both reports discuss the importance of this matter, but neither provides a literature review which may have been helpful in placing this essential concept within an appropriate context. Active reference and use of the work of Patricia Williams, Derrick Bell, Richard Delgado, Sherene H. Raczak, Toni Williams and other others would likely have been helpful in describing the social context giving rise to racism and the struggles for racial equality within law and society. This could have served to underscore the critical commentary provided by Professor St. Lewis and strengthened the arguments of the Working Group. It also could have served to educate the reader regarding the depth of racism within the legal profession, its causes and the importance of substantive strategies to eliminate it.

B) Focus on demographic data and its importance. Both reports provide very little demographic data to support their arguments. While both are aware of its importance, there is no consistent approach to either its reference or use. Professor St. Lewis is clearer in her referencing and recommendations on the use of demographic data; the Working Group is rather silent about this and makes little mention of it in its recommendations. Demographic data is critical to comparing the relative status of groups involved in a common activity. In developing strategies to eliminate discrimination and promote equality, such data provides

benchmarks to compare defined groups. Without it, it is difficult to know whether groups are being treated equally. Some of this data already exists and has been compiled by the LSUC in its Bulletins on Rules 27 and 28 (Spring, 1995). Further, in addressing the paucity of such data and its implications to human rights and racism, both the Supreme Court (Law v. The Minister of Employment and Immigration - SCC File No. 25374; Corbiere v. Canada - 20 May, 1999 - File No. 25708) and the Ontario Court of Appeal (R. v. Siew, Koh et al - 1998 - 116 OAC 245 - Ont. C.A.) have been willing to grant judicial notice to the existence of racism and discrimination. It is unfortunate that these references are not included in the CBA report.

- C) Coordination of recommendations and strategic actions.** Neither report discusses their stylistic or substantive differences nor the importance of distilling any differences in their recommendations in order to coordinate them and develop a common plan for action. Further, while Professor St. Lewis' report provides 'strategic steps' to guide her recommendations, the Working Group report does not. This presents a challenge to the CBA to identify how it will make decisions on these two reports. Which recommendations will it adopt? How will it adopt an action plan? Unfortunately, both reports are not helpful in this regard.
- D) Identifying sources for model activities.** Several models are identified, particularly in the Working Group report; however, source information is not provided. Such information would be useful so that the history, background and implementation strategies employed by these models can be shared. This is a critical matter for those involved in developing and implementing equity initiatives, eg., the ability to connect to sources for information-sharing and ongoing dialogue. It is also integral to facilitating a network of concerned equity practitioners and a critical mass of individuals who can share with and learn from each other, thereby, advancing the state of policy and program implementation.
- E) Compiling up-to-date information on issues under consideration.** A number of the references and sources cited in each report date back a few years and neither report appears to provide current information on activities aimed at addressing racism within the legal profession. For example, while information is used on LSUC articling experiences in 1996,

there is no reference to the recent LSUC Bar Admission Reform nor the literature review conducted by the LSUC Equity Initiatives Department on equity in legal education. Further, there is no information on the strategies employed by the LSUC to address the articling issues raised in both reports; nor is there any reference to the LSUC's review of the Rules of Professional Conduct and establishment of the Discrimination/Harassment Ombudsperson. While it is always difficult to incorporate new developments in reports that have been in the making for a number of years, these shortcomings, on the one hand, challenge the credibility of the report but, simultaneously, point to the need for some type of national clearing house to share up-to-date information on initiatives to promote equity and diversity in the legal profession.

F) Reference to human rights law, the Charter of Rights and Freedoms (Equality Sections) and Law Society Discrimination/Harassment Ombudspersons. It is interesting that both reports do not point out challenges within equality law to many of the practices discussed as problematic or discriminatory. For example, in the area of articling, both reports seem to indicate that the crux of the dilemma rests with law firms in not providing equitable opportunities; neither report discusses this as a law society requirement and the attendant issues of liability to law societies for imposing a requirement which is not accessed equally. Further, neither report discusses the potential use of human rights legislation or complaints processes to address discrimination in employment or access to law schools. There is also little reference to the mandate and functions of Discrimination/Harassment Ombudspersons established by law societies in British Columbia, Nova Scotia, Alberta and Ontario. These are critical shortcomings since some key tools are not identified which law schools, law societies and racialized individuals/communities can use to fight discrimination and promote racial equality.

14. Despite these shortcomings, both reports provide an important and timely array of arguments and recommendations essential to addressing racism and racial equality in the Canadian legal profession. As such, it is incumbent on the CBA to acknowledge their importance and to develop a strategy to reconcile, coordinate and implement the recommendations of both reports. It is also incumbent on

the LSUC to identify how it can cooperate with the CBA in this activity.

Recommendations for LSUC:

15. Both reports have recommendations for consideration and action by the CBA when it meets in Edmonton this August. These recommendations address the CBA, federal and provincial governments, the judiciary, local bar associations and lawyer associations, law schools and law societies. The Working Group puts forward 40 recommendations and Professor St. Lewis puts forward 37. While each report has a number of recommendations on the same subject, there is no substantive contradiction between them. In terms of Convocation's consideration, a response has been developed to address those matters that relating directly to law societies. These recommendations are detailed below.

Working Group Report:

- A) Model Policies for Articling Interviews.** In supporting Recommendation 5, the LSUC should forward to the CBA its guidelines for conducting articling interviews which are published annually in the Ontario Reports and provide commentary on human rights issues in such contexts. Further, the LSUC should inform the CBA regarding its proposed approach to address the articling requirement resulting from Convocation's adoption of the Bar Admission Course Reform and its recommendations addressing further study on articling.

- B) Evaluating Competence.** In supporting Recommendation 6, the LSUC should forward to the CBA and to the Federation of Law Societies both its definition of competence as well as key work of the Competence Task Force.

- C) Complaints Regarding Lawyers and Equality Issues.** In supporting Recommendation 8, the LSUC should forward to the CBA information on the establishment of the Discrimination/Harassment Ombudsperson program. The LSUC should also encourage the

CBA to work in tandem with all law societies, particularly those that have instituted discrimination/harassment programs (eg., British Columbia, Alberta, Nova Scotia, Ontario), to further develop strategies on this sensitive matter.

- D) Workplace Equity Policies.** In supporting Recommendation 8, the LSUC should provide to the CBA its model policies on workplace equity and flexible workplaces adopted by Convocation. The LSUC should also forward the **Bicentennial Report on Equity Issues in the Legal Profession** as well as the “Law Society of Upper Canada: Development of Equity and Diversity Plans Discussion Document”.
- E) Data on Law Firms with Equity Policies.** In supporting Recommendations 10 and 11, the LSUC should provide information on its and LPIC’s contract compliance program and, further, request ongoing information with the CBA on those firms which have established equity policies. This may prove useful to both LSUC and LPIC contract compliance programs as well as provide information on model firms which can be acknowledged and emulated for their implementation of equity initiatives.
- F) Education and Training for Law Firms.** In supporting Recommendation 14, the LSUC should encourage collaboration between the CBA and the LSUC Equity Advisor on this matter. The Equity Advisor has already begun a process to develop an approach for such a program and such efforts can be augmented with cooperation by the CBA.
- G) Aboriginal Issues in Bar Admission Courses.** In supporting Recommendation 25, the LSUC should provide information to the CBA on course modifications which have taken place to ensure inclusion of Aboriginal issues in such areas as real estate, tax law and constitutional law. Further, the CBA should be referred to the recommendations included in the Bar Admission Reform report and recommendations addressing Aboriginal students.
- H) Dialogue with Racialized Communities.** In supporting Recommendation 26, the LSUC should forward information to the CBA on the specialized legal aid services established in

Ontario to address concerns of Aboriginal and racialized communities (eg., the African Canadian Legal Clinic, the Metro Toronto Chinese and Southeast Asian Legal Clinic). Further, the LSUC should refer this recommendation to the Legal Aid Ontario for its comment, particularly respecting service provision to refugee claimants.

- D) Establishing Court Interpreters.** In supporting Recommendation 29, the LSUC should inform the CBA that the LSUC Equity Advisor is prepared to participate in any such proceedings.

- J) Continuing Legal Education.** In considering Recommendation 38, the LSUC should request that the CBA formally consult with law societies on coordinating development and delivery of CLE programs on human rights and anti-discrimination legislation and policies.

Professor St. Lewis' Report:

- A) Law societies working with racialized lawyers.** In supporting Recommendation 11, LSUC should forward to the CBA the implementation plans for the recently adopted Bar Admission Reform process which includes specific consultations with Aboriginal and equity-seeking lawyers, students and communities in the implementation of the Bar Ad reforms. In addition, the “Equity in Bar Admission Course Reform: A Review of the Literature” prepared by the Equity Initiatives Department should be provided to the CBA for its reference and use. In terms of publicizing equity initiatives, this is now being coordinated by the LSUC Equity Initiatives Department and the LSUC should indicate its interest in participating in any effort by the CBA to conduct longitudinal studies of Aboriginal and equity group law students and their journey into the legal profession.

- B) Codes of Professional Conduct and Model Employment Policies.** In supporting Recommendations 13 and 14, LSUC should provide to the CBA and the Federation of Law Societies the current revisions of its Rules of Professional Conduct, particularly the revised Rule on Non-Discrimination which has been redrafted to include clarification on grounds of discrimination and opportunities for positive action to address discrimination and its effects. The LSUC should also forward its model policies on workplace flexibility, and, equity

policies for law firms.

- C) **Participation of Equity-Seeking Lawyers in Decision-Making.** In supporting Recommendation 19, the LSUC should refer the CBA to the appropriate Recommendation in the **Bicentennial Report on Equity Issues in the Legal Profession** (Recommendation #7, p.30). LSUC should also forward the Terms of Reference for the Treasurer’s Equity Advisory Group which was adopted by Convocation in January, 1999.

- D) **Equality Complaints and Legal Aid.** In considering Recommendation 20, the LSUC should refer this matter to the Legal Aid Ontario with a request for information on how this matter can be addressed.

- E) **Dialogue with Human Rights Commissions.** In supporting Recommendation 21, the LSUC should inform the CBA that it has initiated a dialogue process with key staff in the Ontario Human Rights Commission. This is being facilitated by Equity Advisor and includes such topics as the establishment of the Discrimination/Harassment Ombudsperson, outreach programs, articling and establishment of workplace equity policies and programs.

- F) **Cutbacks to Legal Aid.** In considering Recommendation 22, the LSUC should refer this to the Legal Aid Ontario and encourage their participation in any proposed study undertaken by the CBA. This will ensure issues related to the current developments in Ontario are included in the scope of any national study on cutbacks to legal aid and their impacts on racialized communities.

- G) **Development of Clients Rights Document.** In supporting Recommendation 25, the LSUC should refer the CBA to its process in developing the Discrimination/Harassment Ombudsperson program and how such a service will be promoted across Ontario.

- H) **Public Awareness Campaign on Equity in the Legal Profession.** In supporting Recommendation 30, the LSUC should provide to the CBA its report on “Public Education

Activities to Promote Equity and Diversity in the Legal Profession” adopted by Convocation in January, 1999. The LSUC should also indicate its interest in working jointly with the CBA and its local affiliates in developing and implementing such initiatives in Ontario.

- I) Annual Conference on Equity Initiatives in the Legal Profession.** In supporting Recommendation 31, the LSUC should indicate its interest in being part of any such annual gathering and that all law societies should be invited to participate.

- J) CBA Implementation Committee.** In supporting Recommendation 34, the LSUC should indicate its interest in having both the Chair of the Treasurer’s Equity Advisory Group and the Equity Advisor as being part of this committee. This will allow LSUC opportunities to provide and receive information on current developments in equity and diversity within the legal profession at a national level. Such an opportunity can be very useful in setting standards for the profession at a national and local level.

16. Regarding those recommendations which do not have a direct bearing on the LSUC, it is recommended that Convocation indicate its interest in receiving information on their status as well as updates on those recommendations which are adopted for implementation by the CBA. This will ensure that information on the development of equity and diversity initiatives by the other bodies named in the recommendations of both reports is available to the LSUC for its reference, enabling the LSUC to be contemporary in its approach to equity implementation and to be knowledgeable about how other organizations within the legal profession are responding to equity and diversity issues. This may also be useful to direct services provided by LSUC, eg., education and regulatory, as a number of the bodies named in the CBA recommendations have either direct or indirect impacts on LSUC policies, programs and services.

Conclusion:

17. The CBA Working Group report on “Racial Equality in the Canadian Legal Profession” is both a timely and critical document. As more and more Aboriginal peoples and people of colour enter the profession of law, it is incumbent on governing bodies within the legal profession to ensure that these

communities are welcome and that there are no artificial barriers to their entry and success within all levels of the profession. This principle was recognized by Convocation when it adopted the **Bicentennial Report** and has led to the LSUC taking a series of actions aimed at both identifying barriers to the practice of law facing Aboriginal and equity-seeking groups and eliminating them.

18. Based on the activities of the LSUC, it is recommended that Convocation endorse in principle the CBA report and forward this report, with accompanying materials, to the CBA for consideration at its annual meeting in Edmonton this August. It is also recommended that this report be forwarded to the Federation of Law Societies, the National Committee on Accreditation and to the Legal Aid Ontario requesting that they consider and respond to those recommendations which address them.

Charles Smith

APPENDIX “A”

Racial Equality in the Canadian Legal Profession

Presented to the Council of the Canadian Bar Association

February 1999

By the Working Group on Racial Equality in the Legal Profession

The Challenge of Racial Equality: Putting Principles into Practice

The Report of the Working Group on Racial Equality in the Legal Profession

Summary of Recommendations

Recommendation 1

We recommend that the Canadian Bar Association host a meeting with law school deans, from both civil and common law faculties, and with members of associations representing law students and lawyers from racialized communities to:

- develop and encourage the implementation of programs that would eliminate the systemic discrimination which deters students from racialized communities from applying to and getting into law schools; and
- create a national system for tracking the access of students from racialized communities to law schools.

Recommendation 2

We recommend that law school Deans require the editors of the law school student newspaper to review their editorial policies and practices to ensure that they conform to the requirements of provincial/territorial human rights legislation. The editorial policy should include a process for appropriately handling complaints of racist or discriminatory content in the newspaper.

Recommendation 3

We recommend that the Canadian Bar Association request that the members offer to the mentor students in law schools, where appropriate. The CBA could recognize the contribution of mentors at its Annual Conference and through its publications.

Recommendation 4

We recommend that the Canadian Bar Association conduct a fundraising campaign to raise money for bursaries and scholarships for:

- students entering and in law school who are disadvantaged because of discrimination; and
- graduate students studying issues of race and cultural difference and the law.

Recommendation 5

We recommend that the Canadian Bar Association develop and distribute a model policy for articling interviews, which includes:

- strategies for ensuring all students are given a fair chance to compete for available positions;
- a list of types of questions that are unacceptable to ask during interviews; and
- suggestions for ways to prevent racial bias from infiltrating the interview and hiring process and from affecting the articling experience.

Recommendation 6

We recommend that the Federation of Law Societies identify the qualities required of a lawyer going into the practice in the new millennium and the criteria that should be used to evaluate competence with a view to eliminating the systemic discrimination that persists in the current Bar Admission system.

Recommendation 7

We recommend that the Federation of Law Societies review standards for admitting people with non-Canadian experience and training to the practice of law, with a view to eliminating systemic discrimination from the process and to identifying ways in which CBA members can assist with the accreditation process (for example, through mentoring programs or extended articling programs).

Recommendation 8

We recommend that the Canadian Bar Association's racial equality specialist (see Recommendation 31) set up a system so that law students, lawyers and associations of law students or lawyers can confidentially raise concerns about any lawyers or law firms that are not respecting the principles of racial equality in their hiring practices. The racial equality specialist will seek discreet and appropriate ways to remedy the situation.

Recommendation 9

We recommend that, if they do not already have a policy in place, the Canadian Bar Association, all the law societies and le Bureau du Québec, and all Justice Departments and all law firms adopt a workplace equity policy, including equitable hiring policies, and that they actively recruit and hire lawyers from racialized communities when they are positions to be filled.

Recommendation 10

We recommend that the Canadian Bar Association compile and publish a list of all law firms of more than 10 associates who have answered a CBA questionnaire and identified that they have an employment equity policy in place and provided evidence of an on-going commitment to ensuring that the policy is put into practice.

Recommendation 11

We recommend that the Canadian Bar Association compile and publish a list of all law firms of more than 10 associates who have answered a CBA questionnaire and identified that they have an appropriate system in place for responding to concerns about racial discrimination received from clients, support staff, summer students, articling students, associate lawyers and partners.

Recommendation 12

We recommend that all Justice Departments adopt a program of contract compliance whereby only those law firms which have demonstrated a commitment to equity through appropriate hiring, retention and promotion policies and practices would be granted government contracts.

Recommendation 13

We recommend that the Canadian Bar Association meet with federal, provincial and territorial Justice department officials to discuss the mechanisms that will be used to monitor the degree of compliance with these employment equity policies.

Recommendation 14

We recommend that the Canadian Bar Association's racial equality specialist (see Recommendation 31) prepare an equity awareness training course to offer to law firms across the country. This training course would support the development of employment equity and harassment policies to address, among other matters, recruitment, retention and promotion issues and would challenge senior managers to remove the barriers that block the advancement of lawyers from racialized communities.

Recommendation 15

We recommend that all Justice Departments recognize the need for representation of people from racialized communities in decision-making and policy-making roles.

Recommendation 16

We recommend that the Canadian Judicial Council and its provincial equivalents enhance their systems of responding to complaints about judges who are perceived as showing racial bias or discourtesy or unfairness to lawyers, clients, witnesses, court workers, and members of the public from racialized communities, and that Chief Justices and Chief Judges, who have not already done so, establish a protocol for responding to such complaints.

The Basic elements of the complaints system would include:

- discussing the complaint with the judge concerned;
- bringing the complaint to the attention of the Chief Justice or Chief Judge;
- monitoring complaints over time and, when there is a pattern of alleged offensive conduct, having a procedure for taking further action;
- keeping the complainant informed about the handling of the complaint; and
- communicating the existence of this system to all members of the Bar and to all users of the

judicial system.

Recommendation 17

We recommend that the National Judicial Institute's and provincial court judge's social context education programs include materials and resource people with a critical race theory analysis. These programs should also promote a greater understanding and awareness of the experiences of Aboriginal people as they relate to legal issues involving the courts.

Recommendation 18

We recommend that the federal and provincial Attorneys General, in consultation with lawyers from racialized communities and community justice advocates, develop a complaints process for members of the public who have concerns about how they were treated by people in the court process and justice system.

Recommendation 19

We recommend that the federal and provincial Attorneys General implement a comprehensive training program for Crown Attorneys which would focus on incorporating a critical race theory perspective into all aspects of their work, including their exercise of discretion and the impact of their current approaches to legal argument.

Recommendation 20

We recommend that any disclosure of information about which cases will be heard by specific judges must be made available to all interested parties.

Recommendation 21

We recommend that the federal and provincial Attorneys General keep statistics to identify the number of federally and provincially-appointed judges who are from racialized communities.

Recommendation 22

We recommend that each law faculty immediately establish, fund and support an Aboriginal Advisory Committee to design, implement and monitor curriculum changes to ensure compulsory courses include analysis from an Aboriginal perspective. The Committee should also promote compulsory law school community awareness programming concerning Aboriginal matters. An Aboriginal Advisory Committee should include representatives from Aboriginal faculty, students, lawyers and community organizations.

Recommendation 23

We recommend that law faculties, particularly those with a significant number of Aboriginal students or those located in a region with significant Aboriginal population, develop employment equity strategies for hiring Aboriginal professors to tenure-track positions. These strategies should also seek to eliminate discriminatory barriers in the hiring process for contract, part-time and sessional lecturers.

Recommendation 24

We recommend that the Canadian Council of Law Deans establish an Aboriginal advisory committee with representatives from the Indigenous Bar Association, the CBA Aboriginal Law Section, the Native Law Centre and the Indigenous law students association to:

- conduct on-going evaluations of pre-law programs for Aboriginal students;
- promote the recognition of pre-law programs among law faculties; and
- expand pre-law programs to other areas of the country so that they are more readily accessible to Aboriginal students.

Recommendation 25

We recommend that the law societies work with the Indigenous Bar Association and the CBA Aboriginal Law Section to examine the content of Bar Admission Course materials from an Aboriginal perspective and to recommend how to eliminate systemic discrimination in Bar Admission Course materials and examinations.

Recommendation 26

We recommend that the Canadian Bar Association take a leadership role, working with its Branches, with the law societies and with the federal, provincial and territorial governments to initiate a dialogue with representatives from racialized communities and lawyers representing clients from racialized communities to:

- develop a strategic plan for the creation of specialized legal aid services to better serve the community; and
- define an appropriate legal aid program for refugee claimants.

Recommendation 27

We recommend that the federal government change its agreements with the provinces and territories to increase funding levels for criminal and civil legal aid and expand coverage in order to:

- improve access to justice for vulnerable peoples, including people from racialized communities;
- support the increased development of specialty legal clinics to serve specific community needs; and
- establish a fair, non-discriminatory system of legal aid for refugee claimants.

Recommendation 28

We recommend that the Aboriginal Court worker program be expanded to ensure that all Aboriginal people have access to cultural language interpreters when they are interacting with the civil or criminal justice system as a plaintiff, defendant, complainant, accused or witness.

Recommendation 29

We recommend that the Federal Department of Justice organize a consultation with interested parties, including, where appropriate, law societies, provincial and territorial department of the Attorney General, Ministries of Education, lawyers from racialized communities, community justice advocates working with clients from racialized communities and workers in community-based interpretation services to:

- develop guidelines on basic training for all court interpreters;

- consider the need for an interpretation certification program; and
- establish a protocol to protect the confidentiality of communications with an interpreter.

Recommendation 30

We recommend that the Canadian Bar Association, in consultation with lawyers from specialty clinics serving racialized communities, representatives from associations of lawyers from racialized communities, academics and other interested parties, develop a research methodology to assess, from a critical race theory perspective, the positions taken by the federal and provincial Attorneys General in cases involving people from racialized communities.

Recommendation 31

We recommend that the Canadian Bar Association create a full-time position of racial equality specialist to advise the CBA and its members on all matters relating to the elimination of racial discrimination in the legal process, including ways to gather relevant statistics, to measure law firm compliance with employment equity policies, and to monitor the implementation of the recommendations in this Report. This position is to be established for a minimum of 10 years and is to be staffed by a lawyer who has training in equity issues. The position should report to the Executive Director.

Recommendation 32

We recommend that the Canadian Bar Association, at the national and Branch levels, make every effort to remove the particular barriers that impede the participation of members from racialized communities in its committees and structures.

Recommendation 33

We recommend that the Canadian Bar Association, in consultation with law students and lawyers from racialized communities, develop a recruitment strategy and explore changes to its fee structure to attract more members from racialized communities. Changes to the fee structure could include fee reduction incentives and fee scales that recognize fees paid to other associations serving lawyers from racialized communities.

Recommendation 34

We recommend that the Canadian Bar Association Standing Committee on Equity be clearly mandated to pronounce the implementation of recommendations approved by CBA members and to monitor the implementation of recommendations made by Royal Commissions, inquiries and task forces that concern racial equality in the legal community. In its regular report to the membership, the Committee should strive to increase member awareness of these recommendations and the progress with respect to their implementation.

Recommendation 35

We recommend that the Canadian Bar Association cooperate and exchange information with the Indigenous Bar Association, the South Asian Lawyers Association, the African Canadian Legal Clinic and other associations which bring together lawyers from racialized communities.

Recommendation 36

We recommend that the Canadian Bar Association Standing Committee on Equality be mandated to assist with the development of the agenda for the Annual Conference and the Mid-Winter meetings to maximize the inclusion of equality perspectives at the meetings and to increase the participation of lawyers and law students from racialized communities.

Recommendation 37

We recommend that a status report on the elimination of racial discrimination within the legal profession be presented at every Annual Conference, orally and in writing.

Recommendation 38

We recommend that the Canadian Bar Association continue to expand the scope of its continuing legal education programs to include more courses on human rights law and anti-discrimination policies and attitudes.

Recommendation 39

We recommend that the Canadian Bar Association develop a critical race theory framework which its sections and committees can use to analyze issues from an equality perspective and ensure that their recommendations reflect anti-discrimination principles.

Recommendation 40

We recommend that the Canadian Bar Association demonstrate its commitment to racial equality in the legal profession by ensuring that persons in voluntary and staff leadership positions in the Canadian Bar Association participate in training courses that address the issues of discrimination and harassment in all areas of profession conduct, following Canadian Bar Association Resolution 96-05-M.

APPENDIX “B”

Virtual Justice:

Systemic Racism and the Canadian Legal Profession

A Report by Joanne St. Lewis

Co-chair of the Working Group on Racial Equality in the Legal Profession

Summary of Recommendations

It is recommended:

R1

That the Canadian Access to Legal Education Group (CALEG) be given lead responsibility to work in cooperation with the Council of Law Deans to develop:

- model criteria, guidelines for the establishment and monitoring of equity initiatives in Canadian law schools;
- a national review of equality measures and attitudes towards equality in Canadian law schools (to be undertaken every two years to monitor progress towards the elimination of racism in law schools).

R2

That the Canadian Association of Law Teachers (CALT) conduct a follow-up to its report *Creating the Pathways...Widening the Circle* with a particular focus on issues of curriculum, pedagogy and the law school environment. This report to be forwarded to the Council of Law Deans for discussion and appropriate action.

R3

That all law schools require mandatory participation in their law school legal aid program.

R4

That the Canadian Council of Law Deans establish a model anti-discrimination policy focused on law school environment issues, and that a committee comprised of both faculty and students be available to assist law schools in the mediation of internal conflicts or to provide counseling and support on a confidential basis to faculty or students. Law schools that have already established internal complaints procedures should include information regarding this body in all their communications.

R5

That the First Nations legal issues be included as a mandatory component of the law school undergraduate curriculum of every student prior to graduation. Development of the materials should

be done in cooperation with the Indigenous Bar Association (IBA)

R6

That law schools provide annual reports to the CBA on faculty composition and retention from racialized communities for inclusion in its Annual Report.

R7

That the Indigenous Bar Association and the Department of Justice establish a committee with representatives from the Indigenous Bar Association, First Nations governments, and First Nations legal scholars to conduct a feasibility study, and design and establish a First Nations law school.

R8

That the federal and provincial Ministers of Justice and Attorneys-General fund and develop roundtables to meet quarterly with the Indigenous Bar Association to discuss the range of justice issues facing First Nations communities.

R9

That the Department of Justice take lead responsibility for establishing a strategic planning committee with representatives from other government departments, First Nations governments and the Indigenous Bar Association to develop a comprehensive funding protocol for community-focused First Nations law firms.

R10

That the Canadian Bar Association and the Indigenous Bar Association explore sharing resources and expertise through their annual assemblies/meetings. This would provide an opportunity for increased contact and identification of issues of mutual interest.

R11

That each law society work together with law schools and racialized lawyer associations (or members) in its jurisdiction to develop and establish permanent equity in practice committees. These committees would consult, coordinate and develop policies on issues related to entry into the profession. To fulfill their mandate, they would:

- identify the requisite skills and abilities required for admission to the Bar;
- undertake a curricular and pedagogical review of the Bar Admissions Courses to ensure that they combine the development of professional skills with service to a diverse community;
- publicize successful equality initiatives undertaken by law firms within their jurisdiction;
- conduct a longitudinal study of students from equality-seeking communities to determine patterns of participation in the profession from law schools, to obtaining articles, to Bar Admissions examinations, to practice and longevity in the profession;
- facilitate the exchange of information on equality issues between law schools, law firms and individual lawyers.

R12

That the federal and provincial Attorneys-General jointly develop a scholarship and bursary fund for students from equity-seeking communities in three distinct areas: law school, non-funded Bar Admissions Courses and graduate programs. Every effort should be made to encourage the participation of the private bar but their failure to contribute should not preclude the establishment of the fund.

R13

That the Federation of Law Societies undertake a review of the Codes of Professional Conduct to ensure that members of the profession are subject to equal standards and remedies regardless of jurisdiction. This review should be undertaken in conjunction with representatives of human rights commissions so that positive measures such as training and education have an equal presence with remedial/punitive actions.

R14

That the Federation of Law Societies develop model employment guidelines for its members regarding the interviewing, hiring and retention process. These guidelines would then be incorporated by

reference in the Codes of Professional Conduct.

R15

That the provincial and federal Attorneys-General work together with the private bar and law schools to establish consistent criteria for the monitoring of work-force and education participation of members of equality-seeking communities in their institutions.

R16

That the provincial and federal Attorneys-General prepare annual reports on the workforce participation of persons from equity-seeking communities which would be forwarded to the CBA for publication in its annual *Progress Towards Equality Report*.

R17

That the federal Department of Justice provide a list of the successful recipients of work under its contract compliance guidelines to the CBA for publication. Provincial Attorneys-General who have not yet done so should institute a contract compliance policy for the allocation of its legal work consistent with the demographics for their jurisdictions. Every effort should be made to contract directly with or ensure adequate representation of First Nations lawyers and lawyers from racialized communities in areas which directly relate to their communities.

R18

That corporate counsel meet regularly with racialized lawyer associations to discuss how equality issues can be encouraged and implemented through their leadership role as important clients of private law firms.

R19

That law societies take steps to eliminate barriers to the participation of members of equality-seeking communities as benchers and encourage their participation at all levels of their organizations.

R20

That provincial legal aid programs establish a process where client concerns regarding equality issues

in the provision of services could be addressed.

R21

That law societies work together with local human rights commissions to develop programs for identification of systemic barriers within law firms and strategies for removal.

R22

That the Canadian Bar Association coordinate an immediate review of funding cutbacks in provincial legal aid programs by a committee comprised of provincial legal aid program representatives, legal aid lawyers and representatives from racialized communities to examine whether they have a disproportional impact on racialized communities. The results of this review could form the basis of a Court Challenges application.

R23

That the Canadian Bar Association together, with specialty clinics serving racialized communities and racialized lawyers, their associations and academics, develop a research protocol and, conduct a critical equality analysis of the federal and provincial legal departments role in cases involving equality and the advancement of the *Canadian Charter of Rights and Freedoms*.

R24

That the CBA together with provincial licensing bodies in cooperation with major financial institutions develop a funding strategy to assist lawyers from socio-economically disadvantaged backgrounds to establish legal practices.

R25

That law societies develop a client rights document which would inform clients of their rights and methods of seeking redress should they have any concerns regarding the quality or context of the service or advice they have received from a lawyer.

R26

That the federal government examine its judicial appointments process and develop a strategic plan

to increase the representation of First Nations and racialized judges at the appellate level (Court of Appeal, Federal Court of Appeal and Supreme Court of Canada).

R27

That each province establish a committee under the auspices of the Attorney-General comprised of Crown Attorneys, policy analysts, representatives from the community justice organizations and lawyers from equality-seeking communities, to review its Crown Policy Manual in order to eliminate barriers to equality and advance service to diverse communities.

R28

That the Canadian Judicial Council establish a non-judge advocate or ombudsman to facilitate/assist in the mediation of concerns expressed by lawyers or members of the public regarding issues of discrimination by judges. The advocate would provide an annual report to the Council for its consideration.

R29

That the Privy Council Office and its provincial equivalents create an administrative tribunal training program which would provide orientation on basic law and education on social context and the Charter for its appointees at regular intervals during their tenure in office. The model of the National Judicial Institute social context education program should be considered for the development of a permanent training institute for members of Boards and Agencies and the expansion of provincial judges training programs.

R30

That the CBA take leadership role in the formation of a committee as part of the Vision Relevance work which would focus on the development of a public awareness campaign for the profession and the general public on its commitment to equality and the development of a diverse profession. This committee would also undertake to develop tools and provide support to local bar associations, law

societies and law schools who find their equality initiatives subject to attacks based on stereotypes and misinformation. Participation in this committee would be invited from law schools, law societies, local bars and racialized professional lawyer associations.

R31

That, as part of its Annual Conference, the CBA sponsor an annual symposium funded by the Department of Justice, Heritage Canada, and the provincial Attorneys-General, to focus on issues and strategies that arise for the profession in serving a diverse clientele, and which would bring together lawyers, scholars and community justice advocates to share ideas, develop strategies and support initiatives on a national basis.

R32

That the CBA develop a consultation protocol which would enable cooperative work with associations serving racialized lawyers and their communities in the development of policy documents, briefs and interventions in cases to ensure that an equality perspective is incorporated.

R33

That the Department of Justice and the provincial Attorneys-General establish Cabinet Committee on Equality issues which would meet regularly with racialized lawyers and representatives of racialized communities on justice issues.

R34

That the CBA maintain administrative oversight of an implementation committee whose membership should consist of representatives of the diverse stakeholders implicated in the Working Group on Racial Equality Report. Consideration should be given to extending invitations to: members of the Working Group on Racial Equality; CBA branches and committees; law societies; racialized lawyers; First Nations lawyers; racialized law students; law firms; legal academics; and law deans. The committee should have twice yearly in-person meetings. Funding for its effective operation should be provided by the Department of Justice, Heritage Canada and the provincial Attorneys-General.

R35

That the CBA publish an annual *Progress Towards Equality Report* which would be comprised of the annual reports identified in the recommendations contained in this report and such other matters identified by the implementation committee.

R36

That the implementation committee would identify outstanding research areas such as (a) matters requiring empirical studies (B) issue papers to facilitate discussion (c) case studies for training (d) models for environmental scan of legal profession's attitudes and (e) major research projects. This would be included in the annual *Progress Towards Equality Report*.

R37

That the CBA undertake to conduct a critical analysis of Statistics Canada data on the legal profession every five years and make it publicly available to all interested parties in the annual *Progress Towards Equality Report*.